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OFFICE OF PETITIONS

ON PETITION

John William Tocher
18072 Beneta Way
Tustin, CA 92780

In re Application of
John William Tocher
Application No. 09/981,060
Filed: October 18, 2001
Title of Invention: ULTIMATE VENT

This is a decision on the petition under 37 CFR 1.137(a), filed July 3, 2003, to revive the above-identified application.

The petition to revive under 37 CFR 1.137(a) is **DISMISSED**.

This application became abandoned for failure to timely submit a response to the September 12, 2002 non-final Office Action. The Office Action set a 3 month shortened statutory period for reply. A one month extension of time pursuant to 37 C.F.R. §1.136(a) was obtained. However, a response to the Office Action was not received. Accordingly, this application became abandoned on January 29, 2003. A Notice of Abandonment was mailed on May 6, 2003.

PETITION TO REVIVE UNDER 37 CFR 1.137(a)

A grantable petition under 37 CFR 1.137(a) must be accompanied by:

- (1) the required reply,¹
- (2) the petition fee,
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 37 CFR 1.137(a).

The Office may revive an abandoned application if the delay in responding to the

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

relevant outstanding office requirement is shown to the satisfaction of the Commissioner to have been "avoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

Petitioner contends the response to the Office Action was sent to the U.S. Patent and Trademark Office via UPS on January 8, 2003 but the envelope was refused. A second attempt for delivery was made on January 12, 2003 but this was also refused. Petitioner indicates he spoke to a Larry Schwartz, SPE of 3700 who "straightened it out" and referred him to Ira Lazarus, Primary Examiner for Art Unit 3749. Mr. Lazarus suggested petitioner file the instant petition. In support of petitioner's argument, petitioner has provided a UPS receipt.

Petitioner has not provided sufficient evidence to establish unavoidable delay. Petitioner has not stated why the envelope was refused nor has petitioner provided evidence of refusal.

On renewed petition, petitioner should supply any evidence which may assist in establishing unavoidable delay. Petitioner should supply any documentation from UPS which establishes the envelope was refused. Petitioner should also provide a statement as to how and what Larry Schwartz "straightened out".²

Alternative Venue

Petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR § 1.137(b) must be accompanied by the required reply, the required petition fee (\$1300.00), and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR § 1.137(b) was unintentional.

The filing of a petition under 37 CFR § 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR § 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR § 1.137(b).

It is also noted that the address on the petition differs from the correspondence address of record. If petitioner desires to receive correspondence at the address provided on the petition a change of correspondence address should be provided. Until such time, all

² The Office tried to view tracking records for the envelope but was unable to obtain any information. Petitioner may wish to obtain tracking records.

correspondence will continue to be mailed to the correspondence address of record. A courtesy copy of this decision is being forwarded to the address on the petition.

Further correspondence with respect to this matter should be addressed as follows:

By mail:	Mail Stop Petition Commissioner for Patents P.O. Box 1450 Alexandria, VA 22313-1450
By facsimile:	(703) 308-6916
By hand:	Office of Petitions 2201 South Clark Place Crystal Plaza 4, Suite 3C23 Arlington, VA 22202
By delivery service: (FedEx, UPS, DHL, etc.)	U.S. Patent and Trademark Office 2011 South Clark Place Customer Window, Mail Stop Petition Crystal Plaza Two, Lobby, Room 1B03 Arlington, VA 22202

Telephone inquiries should be directed to the undersigned at (703) 306-0251.



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enclosures